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No. 00-1025

IN THE

Supreme Court of the United States

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF OF INTERVENOR NEW ENGLAND POWER COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 205 of the Federal Power Act requires contracts which affect or relate to wholesale power rates to be filed, and provides that "no change shall be made by any public utility" in a filed contract except after sixty days' public notice, "[u]nless the [Federal Energy Regulatory] Commission otherwise orders." 16 U.S.C. § 824d(c), (d).

The question presented is whether, where a wholesale power contract gives the customer an option to extend, the Commission has discretion to order enforcement of the customer's letter exercising that option, where the contract giving the customer the option was on file but the customer's letter exercising the option was not.

RULE 29.6 STATEMENT

New England Power Company is a wholly owned subsidiary of National Grid USA, which is a wholly owned indirect subsidiary of National Grid Group plc, a United Kingdom-based company which has issued common stock to the public.

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STATEMENT OF THE CASE

Petitioner was a wholesale power customer of New England Power Company ("NEPCO"), under a contract scheduled to terminate no earlier than October 31, 1998 and requiring seven years' notice of termination. Under the contract, petitioner agreed to purchase power under NEPCO's wholesale tariff, as amended from time to time. In 1989, the contract was amended to give petitioner an option to extend the contract by a total of twenty years in two ten-year increments. On July 25, 1990, petitioner sent NEPCO a letter exercising the option to extend the contract for the first ten-year increment, to October 31, 2008. Pet. App. 2a-3a. The power sales contract, including the 1989 amendment creating the customer's option to extend, was filed with the Federal

Energy Regulatory Commission ("FERC"). Petitioner's extension letter was not.

Beginning in 1996, a series of structural changes designed to foster competition took place in the power market. Petitioner decided that it wanted to escape its contract with NEPCO, in order to seek alternative sources of supply at competitive prices, and not pay NEPCO any termination charges for premature termination of its contract.

Petitioner's first move was to sue NEPCO for antitrust violations and breach of contract. The breach of contract claim and all but one of the antitrust claims have been dismissed; one antitrust claim is still pending in the district court. *Town of Norwood v. New England Power Co.*, 23 F.Supp.2d 109 (D.Mass. 1998), *rev'd in part* 202 F.3d 408 (1st Cir. 2000), *cert. denied* 121 S.Ct. 57 (2000).

Petitioner's second move was to challenge at FERC the imposition of any termination charge for early contract termination. As part of its restructuring effort, NEPCO entered into a settlement with its wholesale customers, permitting them to terminate their contracts early in return for payment of a contract termination charge. Petitioner refused to participate in the settlement, but instead brought an unsuccessful challenge. *Town of Norwood v. FERC*, 202 F.3d 392, 397 (1st Cir. 2000), *cert. denied*, 121 S.Ct. 57 (2000).

Without waiting for the outcome of its lawsuits, on March 4, 1998, petitioner unilaterally terminated its contract with NEPCO, citing its subsequently-rejected breach-of-contract and antitrust claims, and signed a contract with a new supplier at a rate it deemed more favorable. In response, since the contract did not provide for premature termination, NEPCO filed a tariff amendment with FERC allowing its non-settling customers to terminate early, but requiring a termination charge. FERC approved the tariff amendment.

Petitioner's challenge to FERC's decision was unsuccessful. *Town of Norwood v. FERC*, *supra*.

The contract termination charge approved by FERC consisted of a formula, based on anticipated revenue less anticipated market price of power, for the remainder of the contract. In calculating the amount of the charge, it made a difference whether the contract was viewed (absent early termination) as extending to October 31, 2008.[1] Consequently, petitioner asked FERC for an order declaring that its July 25, 1990 extension of the contract was null and void. Petitioner argued that its July 25, 1990 letter extending the contract to October 31, 2008 should be disregarded, because it was never filed.

FERC ruled 1) that the July 25, 1990 letter was binding on petitioner regardless of whether it was required to be filed, and 2) because the Commission had already approved the option to extend as contained in the filed sales contract, a further filing was not required when petitioner exercised the option. Pet. App. 22a.

The court of appeals affirmed, concluding that FERC had the discretion not to view a customer's letter exercising an option under a filed contract as a separate "contract" requiring additional filing. Pet. App. 9a.

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[1] The contract required seven years' notice of termination. Had petitioner given such notice on the date it purported to terminate immediately (March 4, 1998), it could have terminated legitimately as of March 4, 2005 (assuming its exercise of the option to extend to October 31, 2008 was invalid). Accordingly, this litigation involves termination fees for the period March 4, 2005 to October 31, 2008.

REASONS FOR DENYING THE PETITION

1. Neither the language nor the statutory purpose of section 205 of the Federal Power Act require filing of customer exercises of options under power sales contracts, where the contract itself has been filed. The governing provision is section 205(d), which provides:

> Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public.

16 U.S.C. § 824d(d). Even if the customer's exercise of a contractual option were viewed as a "change" in the contract, it is clearly not a change "by any public utility." And in any event, even if this provision required filing, it allows the Commission to "otherwise order[]," which the Commission has done here.

2. The filing requirement of the Federal Power Act has several related purposes, none of which would be served by requiring the filing of customer exercises of contractual options. First, filing provides the Commission with "the information necessary to decide whether an investigation and suspension of proposed rates should be ordered." *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 247 (D.C.Cir. 1980). Second, it also "give[s] the public notice of proposed changes and opportunity to protest." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 676 F.2d 1374, 1377 (11th Cir. 1982). Finally, the requirement of adherence to filed rates—the so-called filed rate doctrine—supports "the policy of nondiscriminatory rates" by preventing utilities from discriminating in favor of some customers by giving them secret deals not available to all customers. *AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 223, (1998); *see Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990).

None of these purposes would be served by requiring the filing of a customer's exercise of an option set forth in a filed contract, or by refusing to enforce an unfiled option exercise. Where the customer option is contained in a filed contract, as was the case here, the Commission has already had the opportunity to determine whether it is just and reasonable, and members of the public have had the opportunity to challenge it. Members of the public and the Commission may also determine from filed contracts whether the utility has made the same option available to all its customers on equal terms. Once the contract containing the option has been publicly filed and members of the public and the Commission have had an opportunity to review it, a second proceeding to review the customer's exercise of the option would serve no discernible purpose.

There is no basis for the public or the Commission to second-guess the "justness and reasonableness" of the *customer's* decision to exercise an option. The Federal Power Act does not require the *customer*'s decision to be "just and reasonable," if the option itself is "just and reasonable" (which can be determined when the contract creating the option is filed).

Nor does the exercise of an option present a discrimination problem. If the option is available to all similarly situated customers (which can be determined from reviewing the filed contracts), there is no undue discrimination if one customer decides to exercise an option and another does not.

Finally, the public information purpose of the filing requirement does not apply to a customer's exercise of an option under the filed contract. Filing serves the purpose of "giv[ing] the public notice of proposed changes and opportunity to protest." *Southern Motor Carriers Rate Conference v. United States*, *supra*, 676 F.2d at 1377. Filing also enables members of the public to determine what rates are available. But, neither of these purposes is implicated

when a customer exercises an option. There is no basis for public protest of a customer's unilateral decision to exercise (or not to exercise) an option, because the Federal Power Act does not require the *customer's* decision to be "just and reasonable" or nondiscriminatory, as long as the contract itself meets those standards. And what rates are available can be determined by inspecting the utility's filed contracts. A customer's decision to exercise or not exercise an option has nothing to do with what rates the utility has made available.

Moreover, where the filed contract contains an option to extend, the absence in FERC's files of a notice of termination informs the public that service is still being provided under the contract. Under FERC regulations, a utility is required to file a notice with FERC when a filed contract expires and no new contract is filed in its place. 18 C.F.R. §35.15.[2] Thus if the visitor to FERC's files sees a contract with an option to extend, and the original termination date has passed with no filing of a substitute contract or a notice of termination, then the visitor can conclude that the option was exercised.

3. The decision below does not conflict with any decision of this Court or of another court of appeals. All of the cases cited by petitioner apply the filed rate doctrine in circumstances that fulfill the purposes of that doctrine. None of these purposes are implicated here.

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[2] The regulation requires filing a notice of termination for any "rate schedule or part thereof." 18 C.F.R. § 35.15(a). "Rate schedule" is defined to include contracts affecting rates. 18 C.F.R. § 35.2(b)(3). Filing is required when the contract "is to terminate by its own terms," as well as when it is cancelled. 18 C.F.R. §35.15(a). For contracts executed before July 9, 1996 (which includes Norwood's contract), the notice must be filed at least 60 days before the termination is to take effect. 18 C.F.R. §35.15(b). For other contracts, the notice must be filed within 30 days after the termination takes place. 18 C.F.R. § 35.15(c).

Petitioners cite *AT&T v. Central Office Telephone, Inc., supra*, where this Court held that an unfiled agreement on terms of service was unenforceable under the filed rate doctrine, because secret agreements on terms of service might give one customer "'an undue advantage . . . that is not one open to others in the same situation.'" *Id.*, 524 U.S. at 224, quoting *Chicago & Alton R. Co. v. Kirby*, 225 U.S. 155, 163, 165 (1912). But there is no danger of discrimination when a customer exercises an option available under a filed contract. As long as the same option is available to all (which can be determined from inspection of the filed service contracts), the exercise of the option by one customer, and the decision by another customer not to exercise the option, raises no issue of discrimination.

Petitioner also cites *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) ("*Arkla*"), which held that the filed rate doctrine precluded a state court breach of contract action based on the contention that the contract's "favored nation" clause required the customer to pay more than the filed rate, after the customer bought power from a third party at a higher rate without notifying the seller or the Commission. The Court concluded that allowing a state court to determine what rate should have been charged would be inconsistent with the Congressional purpose to "grant[] exclusive authority over rate regulation to the Commission." *Arkla*, 453 U.S. at 580.

Here, since the Commission itself has enforced petitioner's exercise of its option, the Commission's exclusive rate authority is unchallenged. *Arkla* presented a direct challenge to the Commission's authority because the Commission had approved only a "favored-nation" clause of the service contract, but not the specific terms of any rate that might be imported into the contract through the customer's third-party purchases in transactions not subject to the Commission's jurisdiction. This threatened a complete bypass of

Commission authority through state-court enforcement of the favored-nation clause.[3]

By contrast, in this case the Commission's approval of the options clause in the sales contract was limited to two ten-year extensions, and the contract itself provided that the rate charged during the extension period would be in accordance with NEPCO's filed tariff (which the customer could challenge at any time under section 206 of the Act). Thus the Commission's own action in enforcing the option exercise was well within the defined limitations it had approved when the service contract itself was filed. Unlike *Arkla*, the Commission's decision in this case did not involve another tribunal undermining the Commission's authority by imposing a rate or term of service the Commission had never had an opportunity to review.

Not only does the court of appeals' decision affirming the Commission not conflict with the decisions of this Court, it does not conflict with the decision of any other court of appeals. Petitioner cites court of appeals decisions holding that the *utility* could not change the rate at which it sold power, even where the change was authorized by a price escalation clause in the filed contract. *Cities Service Gas Prod. Co. v. FPC*, 233 F.2d 726, 730-31 (10th Cir. 1956); *Episcopal Theological Seminary v. FPC*, 269 F.2d 228 (D.C.Cir.), *cert. denied*, 361 U.S. 895 (1959); *Phillips Petroleum Co. v. FPC*, 258 F.2d 906 (10th Cir. 1958). *See also Mississippi Power & Light Co. v. Memphis Natural Gas Co.*, 162 F.2d 388 (5th Cir.), *cert. denied*, 332 U.S. 770

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[3] The lower courts held that the customer's royalty payments under gas leases from the United States were "purchases" triggering the most-favored nations clause in the customer's service contract. The Commission apparently had not approved the leases. *Arkla*, 453 U.S. at 574; *see Arkansas-Louisiana Gas Co. v. Hall*, 13 FERC ¶ 61,100 at 61,210 (1980).

(1947) (utility's action in giving another customer a more favorable price does not trigger favored-nation clause without an additional filing).

In all these cases, however, the issue was whether the *utility* could take action under the filed contract changing the rate paid by the customer, without an additional filing. Because the *utility* is subject to the statutory obligation to charge just and reasonable and nondiscriminatory rates, filing was necessary to insure that its actions complied with those standards. That does not support petitioner's contention that *customers*—who are not subject to those obligations—cannot validly exercise and be bound by options available under filed service agreements without making an additional filing.

4. Petitioner's theory is that any time a customer has an option under its power service contract, its exercise of the option changes the legal relations of the parties and therefore creates a new "contract" or changes the existing contract, requiring a new filing under the Federal Power Act. That theory ignores the language of section 205(d), which requires public notice of changes in filed contracts only where the change is "by any public utility," and authorizes the Commission to "otherwise order[]." 16 U.S.C. § 824d(d). Even where the change is by the utility rather than by the customer, the statute clearly gives FERC the discretion to decide if and when the filing of an option exercise is required.

Acceptance of petitioner's contrary interpretation would have far-reaching consequences, because it would force FERC to require the filing of option exercises where no purpose would be served other than increasing administrative burdens. Power service contracts frequently give customers the option to choose among several preexisting, specified alternatives relating to the terms and conditions of service. It has not heretofore been thought that every exercise of customer choice requires a new filing; and any such requirement would impose a significant and unnecessary

paperwork impediment to normal commercial transactions among utilities and their customers.

For example, power service contracts frequently give the customer an option as to amounts purchased. A customer may have an option to take less than all its requirements from a single supplier.[4] Under FERC's *pro forma* tariff for transmission service, a customer may have the option of ordering daily service within two days before service is to commence, or hourly service before noon on the preceding day.[5] Customers may have the option of choosing among types of service to be ordered.[6] A customer may have the option as to when service will commence.[7]

Petitioners cite no case ruling that every exercise of a customer option has to be filed. Indeed, under the identical filing provisions of the Natural Gas Act, the Commission has ruled that it would permit pipelines to file *pro forma* agreements with blanks to reflect, among other things, "maximum delivery obligations." *Natural Gas Pipeline*

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[4] *Panhandle Eastern Pipe Line Co. v. FERC*, 881 F.2d 1101, 1104-5 (D.C. Cir. 1989) (customer has option to buy from other suppliers); *Public Service Co. v. New Mexico v. FPC*, 557 F.2d 227, 229-30 (10th Cir. 1977) (customer has option to take any amount of power up to a specified maximum for two years after giving notice of termination). While these cases involved the Natural Gas Act, the filing provisions of that Act are identical to the filing provisions of the Federal Power Act. 15 U.S.C. §§ 717c(c) and (d).

[5] 62 F.R. 12464, 12473 (March 14, 1997) (FERC pro forma tariff for wholesale transmission service).

[6] The FERC pro forma tariff for wholesale transmission service allows customers to request certain types of additional services without amending their filed service agreements. 62 F.R. 12464, 12475 § 22 (March 14, 1997).

[7] The FERC pro forma tariff for wholesale transmission service allows customers to obtain up to five one-year extensions for commencement of service. 62 F.R. 12464, 12473 § 17.7 (March 14, 1997).

Company of America, 77 FERC ¶ 61,028 at 61,119 (1996). Where the exercise of customer options does not constitute a "material deviation" from filed service agreements, the Commission has not required additional filings. *Id.*, 77 FERC at 61,119.

Petitioner's theory would not only require filing in all those cases; it would also destroy the Commission's recent practice of accepting market-based rates in certain cases, under which the tariff simply states that the rate is at whatever level the buyer and seller agree to. Under petitioner's analysis, every transaction under a market-based tariff would represent a new "contract" requiring filing. Market-based tariffs have been upheld, where the Commission finds that the utility does not have market power that would enable it to charge unreasonable rates, on the premise that lack of market power eliminates the need for further regulation of individual transactions. *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870-71 (D.C.Cir. 1993). Separate filing of each transaction under market-based tariffs would be inconsistent with that premise, and in any event would be totally impractical, particularly in modern markets where power is sold on a daily or even hourly basis. [8]

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[8] In any event, FERC's decision to enforce the option exercise was right for an alternative reason. Section 205(c) of the Federal Power Act requires utilities to file contracts "within such time . . . as the Commission may designate." 16 U.S.C. § 824d(c). FERC regulations require filing not less than 60 nor more than 120 days before a contract change is proposed to become "effective." 18 C.F.R. § 35.3(a). FERC's order in this case cited a prior decision requiring the filing of agreements "under which jurisdictional service was being provided." Pet. App. 22a. FERC pointed out that "[h]ere, no service was being provided under the contract extension and service would not have begun until November 1, 1998, had Norwood not previously repudiated the contract [on March 4, 1998]." Pet. App. 23a. Thus the option exercise did not become "effective" until November 1, 1998, and NEPCO was not required to file it, if at all, until

Petitioner is asking this Court for a draconian interpretation of the filing requirement, denying FERC the discretion it has been granted by statute to decide what contract changes need to be filed, and advancing a legal theory that would have enormous adverse implications in current power markets. Consideration of that theory would be particularly inappropriate in a case where the only issue is whether a customer can escape the consequences of its own decision to extend its power purchase commitment. The Commission's decision was consonant with the purposes of the Federal Power Act and well within the Commission's *Chevron* discretion. There is no conflict with the decisions of this Court, or among the Circuits. Certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1, 1998. By that date, Norwood already had terminated. FERC clearly had the discretion to conclude that a contract extension does not become "effective" for filing purposes until service under the extension begins. FERC could reasonably conclude that if it has to review the justness and reasonableness of a contract extension, it should do so shortly before service under the extension begins, rather than when the option to extend is exercised—which may be (as in this case) years earlier.